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# In the
# Supreme Court of the United States

OCTOBER TERM, 1970

## No. 1263

THE NEW YORK STOCK EXCHANGE,
*Petitioner,*

vs.

THILL SECURITIES CORPORATION, ETC.,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION

### OPINIONS BELOW

The opinion of the district court is not reported. The opinion of the Court of Appeals is reported at 433 F.2d 264. Both opinions are set forth in Petitioner's Appendix.

### JURISDICTION — STATUTES INVOLVED

The jurisdictional requisites and pertinent provisions of the Sherman Act and Securities Exchange Act of 1934 are adequately set forth in the Petition, at pp. 1, 2 and A-1 to -4.

## QUESTIONS PRESENTED

1. Does the Securities Exchange Act of 1934 impliedly immunize the New York Stock Exchange from antitrust liability arising from a group boycott of nonmember brokers, denying them participation in commissions on Exchange transactions initiated by nonmember brokers in which the nonmember brokers channel their own customers' orders through Exchange members, who alone have access to Exchange trading facilities?

2. Does the existence of SEC power to review commission rates under sec. 19(b)(9) of the 1934 Act repeal the antitrust laws and abrogate the rule of reason with respect to the group boycott of nonmember brokers without any need for factual inquiry as to whether the application of an antirebate rule to nonmember brokers, by which the group boycott is effected, is necessary to Exchange self-regulation or necessary to make the 1934 Act work?

3. If there be antitrust immunity to any extent with respect to the antirebate rule and denial of economic access to nonmember brokers, is respondent entitled to show facts tending to abrogate such immunity based upon discriminatory application of the rule or upon use of the rule for monopolistic and anticompetitive purposes?

4. Is respondent entitled to show facts tending to establish Exchange liability under the antitrust laws for unfair and anticompetitive practices relating to Exchange advertising and hi-jacking of nonmembers' customers facilitated by the Exchange's monopoly position and by the antirebate rule?

## STATEMENT OF THE CASE

### A. Nature of case and proceedings below.

This is an antitrust action for treble damages and injunctive relief under secs. 1 and 2 of the Sherman Act (15 U.S.C. secs. 1 and 2) and sec. 4 of the Clayton Act (15 U.S.C. sec. 15). The action was commenced by Thill Securities Corporation in its own behalf and, as a class action, in behalf of all other securities brokers in the United States similarly situated as nonmembers of the New York Stock Exchange.

The complaint alleges the Exchange and its members have successfully conspired to monopolize the bulk of the securities industry in the United States and have prevented brokers who are not members of the Exchange from competing in that market to any significant extent by denying them compensation on business they are required to bring to the Exchange because of the monopoly, by restrictive membership policies and by other discriminatory, unfair and anticompetitive acts.

The district court granted the Exchange's motion for summary judgment, holding that the concerted refusal by Exchange members to deal with nonmember brokers regarding the nonmembers sharing in commissions on business furnished by them is "one method of regulating commission rates" and therefore within the scope and purposes of the Securities Exchange Act of 1934, within the Exchange's duty of self-regulation and subject to SEC review under sec. 19(b)(9) of the Act; that since the SEC has been holding hearings since July, 1968 on proposed

changes in the Exchange's overall commission rate structure, including an Exchange proposal to permit economic access for nonmember brokers, it is inappropriate for an antitrust court to scrutinize the concerted total refusal to share that still exists.

The district court failed to consider other potential bases for antitrust liability raised by Thill: permitting selective and discriminatory circumvention of the antirebate rule as to some favored nonmember brokers but not to Thill and others; unfair advertising practices directed by the Exchange monopoly against nonmember brokers; and pirating of nonmember brokers' customers facilitated by the antirebate rule.

The Court of Appeals for the Seventh Circuit unanimously reversed and remanded. Speaking for the Court, Judge Campbell held that *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), did not create an impregnable shield of antitrust immunity in every case where the SEC has power to review anticompetitive Exchange rules; that *Silver* did impose a duty to analyze and reconcile the antitrust and regulatory schemes and to imply antitrust immunity only to the minimum extent necessary to make the regulatory scheme work. The Court said this duty arises precisely at the threshold of the SEC's supervisory power. It directed the district court to require the Exchange to establish that its group boycott of nonmember brokers effected through the antirebate rule, which the Exchange concedes would likely give rise to *per se* liability in a nonregulatory context, is necessary to discharge its self-regulatory duties under the 1934 Act.

The Court also directed the district court to consider the other predatory Exchange practices challenged by Thill, as to which there exist issues of fact making summary judgment inappropriate.

Judge Swygert concurred and further suggested the district court consider whether the doctrine of primary jurisdiction requires soliciting SEC expertise on the question of whether the anticompetitive acts complained of are necessary to make the 1934 Act work before resolution of the antitrust issues.

Judge Pell dissented only as to the scope of the issues to be considered on remand. He stated the reasonableness and necessity of the antirebate rule as such should not be considered on remand. However, he agreed with the majority that fact issues required remand on the question of antitrust liability arising from the Exchange's discriminatory application of the antirebate rule.

## B. Statement of facts.

Thill Securities Corporation (hereinafter, Thill) was for many years a securities broker-dealer located in Elm Grove, Wisconsin. It has never been a member of the New York Stock Exchange, although it has been required to trade in stocks listed on the Exchange for its customers.

The New York Stock Exchange (hereinafter, the Exchange) is the principal market for the nation-wide purchase and sale of the securities of the major industries of the United States (J.A. 6). Well over a billion shares of stock with a combined market value approaching $100 billion are traded there annually (J.A. 70). New York Stock Exchange transactions constitute over 80% of the share volume of all stock transactions on all stock exchanges in the United States (J.A. 61, 70, 142-7). Trading volume averages over 10 million shares per day for extended periods (J.A. 61) and has exceeded 20 million shares per day a number of times (J.A. 64).

When this action was filed over 10 million U.S. citizens owned shares listed on the Exchange (J.A. 7). About 1,600

stock issues are listed on the Exchange, comprising those of the largest American corporations. Most of these issues are traded on the Exchange exclusively.

In addition to controlling transactions in most stocks listed on the Exchange, Exchange members also dominate the other stock exchanges, the mutual fund business and control over 55% of the over-the-counter business in the country (J.A. 104-5); Opinion of Judge Campbell, A-7.

The Constitution of the Exchange limits membership to 1,366 (J.A. 17, 24, 62). The cost of a seat exceeded $500,000 during 1968 (J.A. 62). These numerical and financial limitations constitute a practical bar to direct Exchange membership or access for securities broker-dealers such as the plaintiff, who are not members of the Exchange or partners or voting stockholders (termed "allied member"—J.A. 28) of member firms. Membership in the National Association of Securities Dealers was approximately 4,800 in 1962 but has declined about 20% since then, although dollar- and share-volume in listed stocks greatly increased over the same period (J.A. 66).

When a customer of a nonmember broker desires to buy or sell a stock listed on the New York Stock Exchange, the broker must effect the transaction through one of the members of the Exchange, who alone have access to the Exchange's trading facilities. A commission set by the Exchange's schedules is charged on each such transaction and collected entirely by the Exchange member. Article XV, Sec. 1 of the Exchange's Constitution, as interpreted and applied by the Exchange, prohibits the member firm from paying any compensation to the nonmember broker who supplied the business (J.A. 18, 33). This prohibition, sometimes referred to as the "antirebate rule," has been in effect since long before the enactment of the Securities Exchange Act of 1934 (J.A. 18).

The control of the Exchange over the securities market is enhanced by its continuous adding of various securities to be traded there. Most new securities are launched in the over-the-counter market. After achieving the wide geographical distribution required for listing on the Exchange, largely through the efforts of nonmember broker-dealers, the Exchange often solicits the companies involved to list their stocks on the Exchange. When the stocks become listed the nonmember broker-dealers who helped bring about the conditions permitting listing are foreclosed from further profitable participation in transactions in them (J.A. 64-5).

No one may become a member of the Exchange without signing and pledging to abide by its Constitution, including the antirebate rule. Constitution, Art. IX, Sec. 6—J.A. 25; Exchange Rule 301.28—J.A. 36. The Exchange concedes (J.A. 18) that "violation of the Exchange's rules with respect to minimum commissions which must be charged to other members and to nonmembers are punishable (and have been punished) [sic] through disciplinary proceedings brought by the Exchange."

The Exchange has nevertheless permitted circumvention of the antirebate rule as to some nonmember brokers through such devices as reciprocal business arrangements, give-aways, manufactured participation in trades, transported trades moved from one exchange to another, free services, shares of underwriting fees and other means (J.A. 62-3, 69-71, 73). Thill frequently requested but never received, either directly or by any of the indirect means referred to, compensation for listed business it furnished to member firms (J.A. 62-3).

Customers of nonmember brokers are unavoidably exposed to Exchange members and their employees because

of the antirebate rule. This caused the plaintiff corporation to lose customers when member firms exploited this opportunity by telling the customer that member firms do not have to charge an additional commission as a nonmember might; that the member can handle the customer's over-the-counter business at less cost than a nonmember and by using various other means to wean away plaintiff's customers (J.A. 63-4).

For many years the Exchange has also engaged in advertising campaigns designed to show that only member firms have qualified brokers or brokers so well qualified that no other broker should be patronized. These advertisements imply that nonmember firms are neither safe nor qualified. Exhibits 66 through 73 (not reproduced). All advertising is approved in advance by the Exchange pursuant to Exchange Rule 471 (J.A. 65).

Along with all other exchanges seeking registration following passage of the Securities Exchange Act of 1934, the New York Stock Exchange filed its constitution and rules with the SEC. Without specific findings the SEC registered the Exchange ". . . upon such examination as, under the limitations of time, the Commission has had opportunity to make of the evidence now before it." (J.A. 38)

During its consideration of subsequent commission rate changes proposed by the Exchange the SEC has never considered the matter of sharing of commissions between member and nonmember brokers. SEC Special Study of the Securities Markets (1963), 88th Congress, 1st Session, House Doc. No. 95, Part 2, pp. 310-311.

During the pendency of this action, the Exchange submitted to the SEC for "comment and reaction" a proposal to abrogate the antirebate rule to the extent of permitting

nonmember brokers a one-third share in commissions on business furnished by them to members (J.A. 67, 74, 113). In July, 1968 the SEC began a general investigation pursuant to sec. 21(a) of the Exchange Act into the commission rate structure of the Exchange. Because of the maneuver of the Exchange of proposing to the SEC a form of abrogation of the antirebate rule, the proposal has been included on the agenda of the matters to be investigated by the SEC during its hearings now in progress. No order or request for a rule change relevant to the antirebate rule has ever been issued by the SEC pursuant to sec. 19(b) of the 1934 Act. (J.A. 67) On October 22, 1970 the SEC informally requested the Exchange to submit by June 30, 1971 "a plan for reasonable economic access to the New York Stock Exchange for non-member broker-dealers." SEC Release No. 9007.

## REASONS FOR DENYING THE WRIT

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### I.

### THE DECISION BELOW IS NOT IN CONFLICT WITH SILVER AND KAPLAN V. LEHMAN BROS. AND IS CLEARLY CORRECT.

Petitioner asserts the rationale of *Silver* v. *New York Stock Exchange*, 373 U.S. 341, and the 7th Circuit's decision in *Kaplan* v. *Lehman Bros.*, 371 F.2d 409, support its principal contention that denying nonmember brokers economic access to its market monopoly is immune from antitrust liability because, being related to the fixing of commission rates, the matter of economic access is subject to SEC review.

Petitioner's argument is wrong because it treats this case as if it involved commission rates and self-regulation. This case involves a different matter; it involves a concerted, competition-destroying refusal by the Exchange and its members to deal with nonmembers with respect to economic participation in the business necessarily furnished by nonmember brokers to members. Thus Judge Campbell accurately presented the question in this case as follows (Pet. Ap. A-6):

> "The basic question presented here is whether stockbrokers who are members of the New York Stock Exchange should continue to enjoy their self-acquired freedom from competition by stockbrokers who are not members. Using the vehicle of Stock Exchange rules, members seem effectively to have negated the congressionally mandated principle of competition as it would otherwise apply to them."

That this anticompetitive conduct has been enshrined in a provision of the Exchange's constitution does not detract from its essential character as a concerted refusal to deal.

Plainly, this conduct would be illegal per se in a non-regulatory context. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 at 347; *Radiant Burners* v. *People Gas Co.* (1961), 364 U.S. 656 at 659; *Klor's Inc.* v. *Broadway-Hale Stores* (1959), 359 U.S. 207 at 212; *Associated Press* v. *United States* (1945), 326 U.S. 1 at 12-13; *Fashion Guild* v. *Trade Commission* (1941), 312 U.S.457 at 464-6. The Court of Appeals correctly ruled, following *Silver*, that since the conduct occurred in a regulatory context, liability will attach only upon the Exchange's failure to show the conduct was justified by reference to the purposes of the Securities Exchange Act of 1934. The Exchange has thus far attempted no such showing.

*Silver* held the Exchange liable not because there was no SEC review jurisdiction but because the Exchange's conduct was not justified by the Exchange Act (373 U.S. at 364):

> "Our decision today recognizes that the action here taken by the Exchange would clearly be in violation of the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act, and holds that that statute affords no justification for anticompetitive collective action taken without according fair procedures."

The Court observed the SEC has no jurisdiction to review particular applications of exchange rules. Nevertheless, the Court assumed the SEC would have power under sec. 19(b) of the 1934 Act to require the Exchange to adopt rules providing fair procedures and held (373 U.S. at 364, n.16):

> "Absent Commission adoption of a rule requiring fair procedure, and in light of both the utility of such a rule as an antitrust matter and its compatibility with securities-regulation principles * * * no incompatibility with the Commission's power inheres in announcement by an antitrust court of the rule."

In this case the Court is not asked to do as much as *Silver* authorizes, that is to create a rule. The Court is only asked to strike down certain rules and practices of the Exchange and its members which violate the antitrust laws and find no justification in the Securities Exchange Act or elsewhere. The condition posited in *Silver*, i.e., lack of positive action by the SEC, still exists in this case.

It is also plain this case does not require the Court to dabble in rate fixing. Nonmember brokers are content to let the SEC and the Exchange determine what commission rates shall be charged to the public and how they shall be set. The nonmember brokers seek only fair participation in those commissions.

The Exchange asserts the decision below may have a chilling effect on self-regulation. Yet it has never attempted to show that its group boycott is a legitimate exercise of self-regulation. *Silver* says (373 U.S. 352-355) self-regulation consists in the formulation of regulations governing the conduct of Exchange members, including their dealings with nonmembers in the over-the-counter market, *to insure fair dealing and the protection of investors.* It is far from obvious how the Exchange's group boycott of nonmember brokers promotes fair dealing or protects investors. On the contrary, it seems obvious that the Exchange's conduct is the antithesis of fair dealing and has little if anything to do with the protection of investors. The SEC Special Study states regarding the fairness provisions of the 1934 Act, Part 2 at Page 14:

> "'Fair' also presumably implies, especially in the several references to 'fair dealing' and also the reference to 'unfair discrimination between • • •

> brokers or dealers * * *" that there be no undue advantage or preference among participants in the marketplace; i.e., that there be no unnecessary discrimination in opportunity or treatment or in access to facilities or information. As among participants within any properly recognized category—those making similar use of, contributions to, and demands upon the market facilities—discrimination would be altogether unacceptable."

This Court said in *Silver* (373 U.S. at 364):

> "Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner."

So here, the 1934 Act and its legislative history will be searched in vain for any hint of a Congressional intent to sanction and impliedly immunize from the antitrust laws the fundamentally unfair practices complained of in this action, especially the denial to nonmember brokers of any benefits from business they are forced to provide to the auction market monopoly controlled by the defendant and its members.

In *Silver* the Exchange may well have had good reasons for severing wire service. Perhaps the broker there was undesirable. The Exchange and its members refuse to share commissions with nonmember brokers not because they are undesirable but because they are competitors. On its face, therefore, the Exchange's conduct appears to be self-aggrandizement rather than self-regulation.

The Court below has given the Exchange the opportunity to show, if it can, that its anticompetitive activities are justified by the Securities Exchange Act. This is precisely what the Court in *Silver* said should be done.

The dilemma the Exchange poses—that it may run afoul of the antitrust laws if it attempts to regulate or be ex-

posed to public liability if it does not regulate—is a false one. As the *Silver* Court made clear (373 U.S. at 360):

> "Under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act."

The Court of Appeals' own exposition of *Kaplan* v. *Lehman Bros.*, 250 F. Supp. 562 (N.D. Ill., 1966), aff. 371 F. 2d 409 (7th Cir., 1967), cert. den. 389 U.S. 954, set forth at pages A-15-18 and A-27-28 of petitioner's appendix, shows that case stands only for the limited proposition that the fixing of minimum public commission rates is not a *per se* violation of the Sherman Act and did not involve the use of monopoly power to destroy competition and the discriminatory application of Exchange rules. The instant case does not rest upon per se liability and obviously involved discrimination and the destruction of competition.

## II.

## REVIEW AT THIS TIME WOULD BE PREMATURE, INAPPROPRIATE AND UNNECESSARY.

A. This case came to the Court below on summary judgment. The many fact issues suggested by Judge Campbell (Pet. Ap. A-15, -18, -22) and Judge Swygert (Pet. Ap. A-30) should be resolved before this court considers the merits of the case. A major fact question—which the Exchange begs in its statement of the Question Presented, Pet. p. 2—is whether the Exchange is self-regulating *in good faith* in applying the antirebate rule to nonmember brokers or whether, as plaintiff alleges, it applies the rule to destroy competition. Absent such good faith the Exchange would be liable even under the dissenting view of Justice Stewart in *Silver*, 373 U.S. at 371.

B. Review at this time will not resolve or furnish guidelines for resolving other important issues not raised by the petition for certiorari: e.g., the predatory advertising and customer hijacking referred to by Judge Campbell (Pet. Ap. A-24, -25) and liability based upon discriminatory application of the antirebate rule referred to by Judge Pell (Pet. Ap. A-32).

C. The possibility that the SEC and district court will arrive at different conclusions about the necessity for a total economic boycott of nonmember brokers is extremely remote. Plaintiff obviously seeks economic access to the Exchange. The Exchange, apparently under the stimulus of the instant action, has now proposed to the SEC economic access for nonmember brokers, a maneuver designed to get the question on the SEC's agenda and thus enable the Exchange to contend in the case that the matter is "under consideration" by the SEC. Accordingly, the SEC has requested the Exchange to submit by June 30, 1971 a plan for reasonable economic access for nonmember brokers. This indicates that if a conclusion about the necessity for a total economic boycott of nonmember brokers could be reached officially, it would with apparent certainty be to the effect that such a boycott is unnecessary and that nonmember brokers should be afforded reasonable economic access to the Exchange.

As Judge Campbell points out, however, there is no assurance such a conclusion will be officially reached or implemented or any relief from the existing economic boycott granted merely by placing this question on the agenda of the SEC. The SEC may not act on this matter for an undetermined time in the future and may not act at all; and if and when it does act, and the illegal boycott terminated, the plaintiff and the numerous members of his class seeking relief in this action will not thereby obtain

any compensation for their past damage from the past and continuing application of the antirebate rule and other illegal practices which are the subject of this action.

As the Court points out, these and other questions involved in this action cannot be adequately or fairly disposed of by summary judgment. The welfare of the investing public, repeatedly invoked by the Exchange here, as well as that of the plaintiff and the members of his class require the case be remanded for trial on the merits as the Court of Appeals has directed. As that Court has said, only in this way can the factual and legal issues involved here be adequately presented and determined.

## CONCLUSION

For the foregoing reasons the respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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